I. The Codification Movement in Europe

The codification of private law from the late eighteenth century onwards is regarded, very widely, as a
turning point in the development of private law in Europe. Obviously, some of the more naive
expectations entertained by intellectuals of the Age of Enlightenment have not been fulfilled: the
codifications have neither made the learned lawyer redundant, nor have they led to a lasting consolidation
(or ossification) of private law. They have, however, significantly contributed to the national fragmentation
of the European legal tradition: for codification constitutes a piece of legislation which is applicable only
within the confines of the territory for which the body responsible for legislation is competent to legislate.
There had been signs of such fragmentation at the time of the
usus modernus pandectarum
in the
seventeenth and eighteenth centuries when the 'institutional' writers had no longer discussed Roman law
as such but Roman-Dutch or Roman-Scots law, ius romano-hispanicum or ius romano-saxonicum.
But it had always been clear that these were merely regional or national variations of a common theme:
different manifestations of one and the same
legal tradition. With the enactment of the codifications this
began to change. The awareness of a fundamental intellectual unity got lost and legal scholarship
degenerated, in the much-quoted words of Rudolf von Jhering, to a national discipline the intellectual
boundaries of which coincided with the political ones.

At the same time, the codifications brought to an end the 'second life' of Roman law, i.e. the story of its
practical application in Europe. Since the days of the 'reception' Roman law had provided the basis for
the administration of justice in western and central Europe and had become a ius commune, or common
law. In the process, it had been subject to considerable change; in particular, it had absorbed many
elements of canon law, indigenous customary law, mercantile custom, and natural law theory. The usus
antiquus of Roman law had thus been transformed into a usus modernus pandectarum. Yet, a string of
authors from François Hotman to Hermann Conring and Christian Thomasius had started to shake the
authority of Roman law: of a law that had given rise to intricate doctrinal disputes, that was wedded to
outdated and impracticable subtleties, and that had been enacted by the despotic rulers of past ages.
Also, since Roman law was applicable only in subsidio, countless more specific territorial or local laws
could govern a particular dispute. The great number and complexity of legal sources contributed to a
widespread feeling of legal uncertainty and inefficiency as far as the administration of justice was
concerned. The codifications were supposed to tidy up this messy situation: they were to provide a systematic regulation of the entire private law, ousting all rival sources including, in particular, the ius commune. Thus, Article 1 of the Dutch Abrogation Act (Afschaffingswet) provided, in a phrase suffused with fear, relief, and elation: ‘The legal validity of Roman law is and remains abrogated.’

II. The German Civil Code as a Late Fruit of the Codification Movement

The German Civil Code is a comparatively late fruit of the codification movement. The three great natural law codifications in Prussia, France, and Austria had been prepared in the late eighteenth and early nineteenth centuries. They were intended to satisfy the desire for territorial legal unity. The Code civil, in particular, had thus become a potent symbol for the one undivided nation that had emerged from the upheavals following 1789. In the course of the nineteenth century, however, most of the other states of central, southern, and western Europe had codified their private law. Predominantly, the Code civil had been the source of inspiration. It continued to apply in Belgium and became the basis of the Dutch Burgerlijk Wetboek of 1838. It provided the point of departure for the Italian Codice civile of 1865 (which could thus be enacted a mere four years after the kingdom of Italy had come into being), for the Portuguese Código civil of 1867, the Spanish Código civil of 1888 – 89 and the Romanian Civil Code of 1865. The Serbian Civil Code of 1844, on the other hand, had been influenced mainly by the Austrian Code.

Increasingly, therefore, the legal position prevailing in nineteenth-century Germany was bound to look odd and anachronistic. The Prussian territories (including Westphalia, Bayreuth, and Ansbach) were governed by the Preußisches Allgemeines Landrecht. In the Rhine-Province, Alsace, and Lorraine the Code civil applied. The Grand Duchy of Baden had adopted the Badisches Landrecht which was based on a translation of the Code civil. The Kingdom of Saxony enacted its own Civil Code in 1865. Some places in Bavaria lived according to Austrian law, while in parts of Schleswig-Holstein Danish law prevailed. Most of the remaining German territories (comprising, in 1890, close to 30 per cent of the population of the Deutsches Reich) still administered justice according to the ius commune. But the ius commune only applied in subsidio. Countless more specific territorial or local laws could therefore govern a particular dispute: from thirteenth-century texts like Eike von Repgow’s famous Sachsenspiegel to Baron von Kreittmayr’s Codex Maximilianus Bavaricus Civilis of 1756, from the Neumünsterische Kirchspielpbräuche to the Nassau-Katzenelnbogenschne Landesordnung. Thus, for example, there were all in all more than one hundred different regulations concerning succession upon death. None the less, in the German territories, a fundamental intellectual unity had continued to persist throughout the nineteenth century. That unity was forcefully promoted by Savigny’s Historical School of Law and the pandectist legal scholarship that emerged from it. Thus, the contemporary version of Roman law did not apply only in the areas still governed by the ius commune; even in the countries of codified law it provided the underlying legal theory. It provided the self-evident point of reference for understanding and assessing the codifications and territorial statutes. Therefore, it remained perfectly possible for a law professor to be called from Königsberg to Strasbourg, from Gießen to Vienna, or from Heidelberg to Leipzig. Nor were law students, as far as choice and change of universities were concerned, confined to the institutions of the state in which they later wanted to practise. Neither the Prussian Code, nor the Code civil or the Saxonian Civil Code, became the focal point for the legal training offered in the universities of the respective states. Just as the codified laws had at first been neglected, and subsequently been pandectified, by contemporary legal scholarship, they constituted hardly more than an appendix to the courses on Roman private law in the curricula of nineteenth-century law faculties.

III. The Programme of ‘Historical Legal Science’

Our perception of nineteenth-century pandectist ‘legal science’ has been coloured, for a long time, by the exaggerations of those who attempted to break away from it and from the ‘conceptual jurisprudence’ established on that basis. Thus, a scholar like Georg Friedrich Puchta is only slowly beginning to emerge from the shadow cast by the pre-eminence of Savigny. Jhering’s work cannot be apportioned as easily, as once thought, into two different periods, separated by a ‘conversion’ from conceptual to functional jurisprudence. And even Bernhard Windscheid, the embodiment of pandectist scholarship in the second half of the nineteenth century (‘Legal scholarship means pandectism, and pandectism means Windscheid’) not only regarded himself as the servant, but also as the master of the concepts. True law,
for Windscheid, was ‘strict but, at the same time, lenient; fixed and yet free; firm but also flexible’ (that corresponded to the ideal of classical Roman law), and the true Jurist, in his view, was able, like the Roman jurists, ‘to serve his concepts and freely to rise above them’. The programme of ‘historical legal science’, as it had been developed by Savigny at the beginning of the century, had also been characterized by a certain tension. For while the emphasis of an organic connection between contemporary law and the entire past led to a discovery of the modern discipline of legal history (previously there had only been ‘legal antiquities’), Savigny ultimately aimed at legal (rather than historical) scholarship, i.e. the establishment of a legal doctrine which, though developed ‘historically’, was in conformity with contemporary requirements. Thus, in the preface to his System des heutigen Römischen Rechts (System of Contemporary Roman Law) Savigny emphasized the need ‘firstly, to trace and establish, within the entire body of our law, what is… of Roman origin, in order not to be unconsciously dominated by it; but then our approach aims at eliminating, among these Roman elements of our intellectual formation, whatever has in fact withered away and merely continues to lead a troublesome shadow life as a result of our misunderstanding’. The main task of a scholar in private law, he writes at another place, ‘is the intellectual penetration, adaptation and rejuvenation’ of the legal material as it has come down to us. Savigny’s vision of an ‘organically progressive’ legal scholarship, based on a uniform body of sources, guided by the same methodological convictions, and common to the whole nation – for Windscheid this was ‘a revelation’ – led to a heyday of legal scholarship in Germany. It constituted the intellectual foundation for the emergence of a national community of scholars, of German legal unification on a scholarly level. At the same time, pandectism secured the leading place for Germany in the world of nineteenth-century legal scholarship: it was much admired by lawyers all over Europe and exercised significant influence on the legal development in countries such as France, Italy, and Austria.

An obvious paradox inherent in Savigny’s programme that has repeatedly been noted consisted in the emphasis on Roman law as the basis for a contemporary theory of private law. It ill matched the idea of law as being the product of the spirit of the people (Volksgeist). The phenomenon of the ‘reception’ could only be explained in a very tortuous way on that basis. A second problem arose from Savigny’s partiality for the pure and undiluted Roman law, corresponding to the educational principles of contemporary humanism and the aesthetic ideas of classicism. It entailed a somewhat disdainful attitude towards the immediately preceding period of the usus modernus pandectarum and a negative, and essentially unjust, evaluation of the work of the medieval Commentators whose mos italicus had paved the way for the usus modernus. This attitude was not easily reconcilable with a programme that was fundamentally based upon the notion of ‘organic growth’ and insisted on ‘the even and dispassionate recognition of the value and individuality of every age’.

IV. ‘Historical Legal Science’ and Codification

Moreover, there was, within the Historical School, an ambivalence towards the question of codification that was never quite resolved. The ‘founding manifesto’ of the Historical School was Savigny’s reply to A.F.J. Thibaut’s call to end the intolerable and inconvenient diversity of private laws prevailing in Germany by adopting a General German Civil Code, modelled on the French Code civil. In his famous essay entitled Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (Of the Vocation of our Time for Legislation and Legal Science) Savigny not only rejected the idea of a codification to be drafted and enacted hic et nunc, but criticized the very notion of a codification as inorganic, unscientific, arbitrary and hostile to tradition. At best, it was unnecessary; at worst it would distort and stifle ‘organic’ legal development.

None the less it was widely accepted, from about the middle of the nineteenth century that a codification of private law in Germany was about to come and was to end the direct application of Roman law. Theodor Mommsen in 1848 voiced the German nation’s desire for the creation of a uniform and national law, and Rudolf von Jhering predicted in 1852 that his own generation of lawyers would see the demise of Roman law in its present form. The editorial of the first volume of the Zeitschrift für Rechtsgeschichte (Journal of Legal History 1861), while professing to continue the plan and the aims of Savigny’s Zeitschrift für geschichtliche Rechtswissenschaft (Journal of Historical Legal Science) gave expression to the prevailing conviction that the historical development of the law could now sufficiently clearly be assessed ‘for the results of the historical inquiry to be employed in the legislative process’. And even one of Savigny’s most faithful disciples, who had sat at his feet in the University of Berlin and who had never ceased to see in
him his own scholarly ideal, Bernhard Windscheid, was among the most influential proponents of a German codification. Among the German lawyers, he wrote in 1878, ‘there are probably relatively few who have not, with all the strength of soul available to them, yearned for the great work of a German code of private law’. Thus, it is small wonder that the codification’s entry into force on the first day of the new century was greeted with strong feelings of national pride. The new century brings to fruition the greatest feat achieved in German legal life, as it was put in one of the two leading law Journals for practitioners, while the other one, the Deutsche Juristenzeitung (German Lawyers’ Journal) opened its January issue for the year 1900 with an ornamental page carrying the heading ‘One People. One Empire. One Law’. For the first time, the notion of legal unity had become reality on German soil and for the first time, therefore, the energies of scholars and practitioners alike could focus on the interpretation of one and the same authoritative text.

V. Legal Unity by Way of Legislation

The way towards legal unity by means of a code of private law had been long and arduous. In the first half of the nineteenth century, the various states joined in the Deutscher Bund (German Federation) had already started to accommodate the needs of an expanding economy that was operating increasingly on a supraregional level. The advent of machinery and urbanization facilitated the production processes and the rising bourgeoisie favoured open markets promoting the free interplay of economic forces. Legal unification therefore was required, first and foremost, in the trade-related fields of law. A first significant step in this direction was the establishment of a German Customs Union in 1833. In 1848 the law of negotiable instruments was unified by means of the Allgemeine Deutsche Wechselordnung, and between 1861 and 1866 nearly all the states of the Deutscher Bund adopted the draft of a General German Commercial Code (Allgemeines Deutsches Handelsgesetzbuch) that had been completed in 1861. A draft law of obligations (Dresdener Entwurf) was published in 1865. Although it was never adopted, it significantly influenced the German Civil Code.

After the creation of the Deutsches Reich a streamlined procedural and organizational framework for the uniform and efficient administration of justice was established: the four Reichsjustizgesetze concerned the unification of the court system (Gerichtsverfassungsgesetz), the law of bankruptcy (Konkursordnung), civil procedure (Zivilprozeßordnung), and criminal procedure (Strafprozeßordnung). They all came into force in October 1879. While they have been amended on various occasions, three of these acts remain upon the statute book today; the Konkursordnung was replaced by a newolvency code (Insolvenzordnung) in 1999. The first of October 1879 also saw the opening of a supreme appeal court for the entire Reich in all civil and criminal matters: the Reichsgericht. Its seat was Leipzig, a city with a distinguished legal tradition which had the advantage of not being identical with, but still sufficiently close to, the political capital of the Reich (Berlin). Its first president was Eduard von Simson, a Prussian lawyer of Jewish descent who had been baptized in his early youth. He had presided over the German National Assembly of 1848 that had met in the Frankfurt Paulskirche and had also been president of the Imperial Parliament.

The scene was thus set for what was to be the crowning symbol of German legal unity: a code of private law. Its gestation period was close to thirty years. The starting shot was fired by the lex Miquel Lasker of 1873, by means of which the power to legislate concerning the entire field of private law was conferred on the Imperial Parliament. The details of the way in which the BGB has been prepared have often been recounted: appointment of a preliminary commission and, subsequently, of the First Commission, preparation of preliminary drafts by the reporters appointed for the five books of the projected code, publication of the First Draft with the attendant motivations (entitled Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich), vigorous and very controversial public debate, deliberations of an internal commission of the Imperial Department of Justice, appointment of the Second Commission, publication of the Second Draft, again with the attendant motivations (this time entitled Protokolle der Kommission für die Zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuches), revision of the Second Draft by the Federal Council (Bundesrat), the debates in the Imperial Parliament (both in committee and in plenary sessions), the taking of the final vote (with the Social Democrats voting against the code because it did not deal with labour relations), promulgation in the Government Gazette of 1896, and entry into force a little less than three and a half years later, on 1 January 1900. In 1897 the librarian of the Reichsgericht, Georg Maas, published a little-known bibliography of the official documents
relating to the Civil Code: two years later a very useful collection of many important (though not, as was claimed in the title of the work, all) documents was edited by Benno Mugdan. In the meantime, the genesis of each individual rule contained in the BGB has been traced and made available in an easily-accessible manner by Horst Heinrich Jakobs and Werner Schubert. In addition, Werner Schubert has organized a reprint of the preliminary drafts of the reporters appointed for the First Commission and their motivations. They contain a wealth of comparative material and are an outstanding source for the state of contemporary doctrinal discussion.

The BGB was supposed to be, in Bernhard Windscheid’s words, ‘a cathedral of national splendour’, and Windscheid himself became one of its principal architects. Neither the design nor the details of its construction, however, could be taken to have been lifted from ‘among the treasures deeply hidden in the people’s soul’. The general public in Germany has never developed any enthusiasm for the BGB, in spite (or, possibly because) of all of its technical qualities. And even among lawyers, the code was not universally greeted with feelings of elation or joy. The publication of the First Draft had initiated a persistent stream of criticism. ‘A tornado broke loose. It rained, it poured books and pamphlets... The project was criticized from every point of view... One might have thought that the whole scheme would perish’: thus Maitland, from the perspective of a foreign observer. This criticism was taken into account only to a limited extent. Eventually, German lawyers began to resign themselves to the idea that perhaps too much had been expected of the Civil Code.

VI. The BGB as a ‘Prison Cell’?

At the same time, there had also been widespread feelings of apprehension in the years before 1900 as to how the codification would influence the administration of justice. Many lawyers realized that, in view of the special nature of the Roman legal sources, they had enjoyed a great degree of freedom. The richness and complexity of those sources had allowed wide scope for doctrinal development and innovation, and the pandectist scholars had thereby become the high priests of legal scholarship. The new code, it was feared, would reduce the judge to a mere ‘subsumption machine’ (Subsumtionsautomat), and would constitute a prison cell for legal scholarship. There was great concern about an impending ‘cult of literalism’. These anxieties prompted some authors to attribute to the BGB merely the status of a ‘restatement’; they stimulated renewed attempts to search for criteria of justice beyond the positive law; and they contributed substantially to the rise of the ‘free-law movement’ (Freirechtsschule). Looking at the way in which private law developed in the course of the twentieth century it appears that the BGB did in fact prove to be a kind of prison cell in one respect. For, while the draftsmen of the code had still based their proposals on remarkably comprehensive comparative legal research, private law legislation in the new century in the words of Ernst Rabel, became enamoured with the example of the Great Wall of China. A similar observation could be made as far as legal doctrine and the study of law are concerned. By the time the BGB entered into force, an avalanche of legal literature had started to sweep across the German legal landscape. Textbooks and commentaries on the BGB had been appearing since as early as 1897. In 1899 a bibliography was published that listed approximately 4,000 titles of over 324 pages. This literature, however, was almost exclusively exegetical in character, focused on the wording of the Statute. Many authors at first did hardly more than paraphrase the statutory provisions. They waited to see how these provisions would be applied in practice and then began to integrate the rapidly emerging case law into the new editions of their works.

Thus, very soon, the letter of the law was filled with life. At first glimpse, at least, it appeared to be a new and youthful life. Since the codification, according to contemporary opinion, contained a comprehensive and closed system of legal rules, it constituted an autonomous interpretational space. Thus, on the one hand, ‘the recollection of pandectist scholarship, one of the supreme achievements of the German legal mind’, faded remarkably quickly from both the doctrine and the practice of German law; Savigny, Dernburg, Jhering, Windscheid, and many other of the leading authors of the nineteenth century were hardly cited any longer, not to mention the earlier literature of the ius commune or the Roman legal sources themselves. The ‘historical’ interpretation was largely reduced to a perusal of the materials and motivations produced by the draftsmen of the code. Of considerable significance, in that respect, had been the decision of the German law teachers in 1896, at a Conference in Eisenach, to assign to the BGB the central position in the law curriculum; this was quite contrary to the way in which the codifications prevailing in parts of nineteenth-century Germany had been treated. On the other hand, everything
which lay outside the territorial scope of application of the national codification also vanished from the intellectual horizon of legal academics and practitioners. German law was to be understood and developed from within itself: Italian and French legal literature, let alone English case law, could contribute nothing to it. The codification thus promoted not only a vertical, but also a horizontal, isolation of legal scholarship. [71]I] simply do not believe that contemporary law has really grown from the old law, but I regard it as something new, created by the need of the present day and the sovereign will of the modern legislature*, wrote Konrad Cosack, the author of a modern textbook, and he therefore refused to develop the law historically. At the same time, the organic point of departure for the incorporation of comparative law was lost. The legal horizon was limited by the rules and principles contained in the BGB. Within this framework, judges and legal writers strove to determine ‘the concept’ of impossibility to distinguish the different types of damage that can arise as a result of the delivery of non-conforming objects, or to penetrate the labyrinth of the ‘owner-possessor-relationship’. According to prevailing, contemporary ideology the codification represented the turning point of German legal history.

VII. The Reaction of the Courts

And the courts? Even in the course of the nineteenth-century legal practice had not conformed to the ideas usually associated with the terms ‘conceptual jurisprudence’ and ‘scholarly positivism’. Self-confident courts like the Supreme Appeal Courts of Kassel, Jena, or Munich, the Supreme Appeal Court of the four free cities in Lübeck, the Prussian Supreme Court, or later the Imperial Supreme Court in Commercial Matters and, from 1879, the Imperial Supreme Court, were able without any difficulty to procure for themselves ‘the freedom of movement which is so indispensable for a judge’ (and which was indeed conceded to them by clear-sighted authors like Windscheid). An example can perhaps illustrate this assertion. At the beginning of the nineteenth century Gustav Hugo had stated very pointedly that Aquilian liability could, essentially, be reduced to the principle: whoever unlawfully injures another is bound to pay compensation. This assertion, he added, gave offence to ‘the exact scholars’ and was, therefore, not to be found in any of the textbooks, even although it correctly reflected the practice of nearly all courts in Germany. But it was quite in tune with the tradition of the *ius commune* and was to lead, in the course of the following decades, to decisions where compensation was granted for pure economic loss. Essentially, therefore, the lex Aquilia was applied in a very similar way as the general provision of delictual liability in French law (Article 1382 Code civil) was interpreted by the courts. There were many other developments which an ‘exact scholar’ must have observed with alarm. Thus, as far as liability among neighbours was concerned, pandectist legal literature tended to insist on fault. At the same time, however, the courts displayed a remarkable willingness to abandon the axiomatic fixation on the *culpa* requirement as a Foundation for extracontractual liability. When, from the middle of the nineteenth century onwards, industrialization led to a significant increase in neighbour disputes, they realized that an owner of property has to be granted protection, at least in some situations, even beyond the general principles of Aquilian liability. The *actio negatoria* was among the remedies liberally extended in this context. The possibility of sanctioning wrongs by means of private law had vanished from legal practice long before it had vanished from the textbooks. And that an owner has to make sure that his property does not constitute a danger to the public was recognized long before the concept of *Verkehrssicherungspflicht* had found its way into legal literature. Many more examples could presumably be found by closely analysing nineteenth-century court practice. The Imperial Supreme Court in Commercial Matters displayed a great deal of creativity in the nine years of its existence, and in the reasons for its decisions it relied surprisingly often on comparative observations. The *Reichsgericht* interpreted the codes and statutes which it had to apply not in a literalist manner but in the spirit of the historical school, i.e. with reference to the general thinking patterns of pandectist legal scholarship.

This comparatively flexible approach towards the applicable sources of law did not significantly change after the enactment of the BGB. For, contrary to a widely held opinion, the first decades of the twentieth century were not marked by conceptual jurisprudence, statutory positivism, and the fine art of the ‘legal game of chess’. Thus, for example, the *Reichsgericht* continued to apply the *exceptio doli* in the tradition of the *ius commune* soon after 1900, it began, from a number of different starting points, to turn the decision of the draftsmen of the BGB not to recognize the doctrines of *culpa in contrahendo* and *clausula rebus sic stantibus* on its head; it granted claims arising from positive malperformance (positive *Forderungsverletzung*) of contracts of sale based on § 276 I 1 BGB in exactly the same way as it had
previously done on the basis of the actio empti of the ius commune; it recognized a right to terminate the contract even in these cases of contractual liability; the judges of the Imperial period had already laid the foundations for the recognition of a contract with protective effect vis-à-vis third parties and the doctrine of transferred loss (Drittschadensliquidation); they set in motion the process of a transformation of the law of delict, which was later analysed in a famous article by Ernst von Caemmerer; they established the essential contours of the law of agency as it is practised today, and they determined the boundary between liability for latent defects and the law of mistake which was to hold for the rest of the century. Here, too, many other examples could be given. Where the Reichsgericht developed the law, there are usually either overt or covert lines of continuity linking the new law to the old: either because the judges simply perpetuated their earlier case law, or because they extended a line of development which had its origin in the nineteenth century. Except in the ideology of most law teachers, the BGB was certainly not a watershed in German legal development; indeed, rather it bore certain characteristics of a restatement while, at the same time, settling a number of deeply-rooted doctrinal disputes. Or, as Bernhard Windscheid wrote in an article in which he attempted, for himself, to resolve the tension between the programme of the Historical School and the impending codification of German private law, or between legal science and legislation: ‘As historical jurists we know that the code will be no more than a moment in the development, more tangible, certainly, than the ripple in a stream but, none the less, merely a ripple in the stream’. The great achievement of the Reichsgericht lay in the fact that, from the outset, it cautiously developed the law and adapted it to new and changing circumstances while generally avoiding any break in continuity. Among the tools used by the judges were the undisguised appeal to general legal intuition or common sense, the reading of tacit conditions into the contract (a device which has been popular at all times and in many countries), and the construction of fictitious contracts. And in order to satisfy, at least formally, the demands of statutory positivism, even the legislative history was occasionally subjected to a somewhat skewed perspective determined, above all, by the desired result.

VIII. Unity of the System of Private Law?

‘But nothing is more certain than that the old society and economic system has irretrievably come to an end’ (Thomas Mann in his diary, 15 April 1919). That collapse resulted from the First World War and the upheavals caused by it. At the same time, our perception of the world changed dramatically. ‘The modern world began on 29 May 1919’, writes Paul Johnson, ‘when photographs of a solar eclipse, taken on the Island of Principe off West Africa and at Sobral in Brazil, confirmed the truth of a new theory of the universe’. Obviously, the nineteenth century only really ended at around 1920. Thus, unlike the Code civil, the BGB did not herald the beginning of the new epoch. In many respects, it still reflected the values of a world that was destined to disappear.

It was a world with a patriarchal family structure, with associations and foundations still firmly under the tutelage of state authorities, and with a comparatively formal concept of freedom of contract; a world in which a regulation on bee swarms was regarded as more important than one on standard terms of business. The typical citizen for the BGB was not the factory worker but rather the moneyed entrepreneur, the landed proprietor, or the public servant. In a number of respects, therefore, the BGB was soon to be regarded as outdated. About 160 statutory amendments and decisions of the Federal Constitutional Court have affected both the text and substance of the code, more than half of them, however, dating from the last quarter of the twentieth century. Family law, in particular, has been subject to fundamental changes; more than thirty important amendments have left hardly any part of it unchanged. Comparatively few changes have been made to text of the other four books. The provisions on lease and employment contracts have been considerably modified and supplemented, but the development of the law of domestic leases has largely, and that of labour relations has completely, taken place outside the framework of the BGB. Other major amendments concern the regulation of contracts relating to package holidays in §§ 651 a ff., the law of land tenure (§§ 585 ff. BGB) and contracts concerning bank transfers, bank payments, and giro accounts (§§ 676 a ff.).

Outside the BGB, however, a secondary system of private law by way of special statutes has grown up, by means of which the social model underlying the BGB has been adapted to modern conditions. Apart from competition law and labour law, the law of consumer protection deserves particular mention in this context. Among its core components are the statutes on standard terms of business (1976), doorstep sales and similar transactions (1986), and on consumer credits (1990), but also other statutes
like the ones dealing with liability for defective products (1989), time-share agreements (1996) and distance sales (2000). It is often overlooked that this tradition of excluding from the general private law codification subjects which are considered to be of a special nature dates back to the Historical School and that therefore neither the statute concerning instalment sales (1894) nor the one imposing strict liability for personal injuries sustained in the operation of a railway (1871) were included in the code. It has, in fact, remained controversial until today whether, or to what extent, such subjects have attained the kind of structural and conceptual stability required for incorporation into a general code of private law.

IX. The Resilience of the BGB

With the Modernization of the Law of Obligations Act, most of the special statutes in the field of consumer contract law have now found a place in the BGB. In addition, there have been reforms affecting the law of damages, contract of lease, form requirements, package holidays, and foundations. The introduction of same sex partnerships by an act of 16 February 2001 has led to more than thirty provisions throughout the BGB being amended. All these changes, however, have happened in the course of the past four years. Up to that time, i.e. for the first one hundred years of its existence, the text of the BGB (apart from the provisions on family law) had been remarkably resistant to change. This resilience throughout all the upheavals of the twentieth century has frequently been commented upon. It is less remarkable for property law, the law of succession, and even for delict or unjustified enrichment, than it is for an inherently dynamic subject such as contract law. The ‘evacuation of important developments (labour law, social lease law, consumer law) provides only part of the explanation. Another reason for the BGB’s resilience lies in the character of the code itself. In form and substance it was moulded by nineteenth-century pandectist scholarship. Its draftsmen had, very largely, aimed at setting out, containing, and consolidating ‘the legal achievements of centuries’. The BGB was regarded as part of a tradition significantly shaped by legal scholarship. The phenomenon of scholarly ‘development’ of the law was quite familiar to the draftsmen of the code. Horst Heinrich Jakobs has, therefore, pointedly referred to the BGB as a codification ‘which does not contain the source of law in itself but has its source in the legal scholarship from which it was created’. The BGB was designed to provide a framework for an ‘organically progressive legal science’. The idea of enacting a prohibition of commenting upon the BGB (as existed with regard to the Prussian Code of 1794) was quite alien to the draftsmen of the BGB: as alien as the equally odd idea that it might be possible to lay down a specific rule for every imaginable situation. Time and again, the travaux préparatoires contain express statements to the effect that the solution to a specific problem has to be left to legal scholarship.

Moreover, in spite of having been influenced so strongly by pandectist legal doctrine, the BGB is not doctrinaire in spirit and outlook. Its draftsmen did not feel called upon to provide authoritative definitions for fundamental concepts such as contract, declaration of will, damages, causation, or unlawfulness and thus, in a way, to remove these matters from scholarly discussion. Nor did they determine questions of legal construction (what type of legal act is the performance of an obligation?). A number of basic evaluations and doctrinal points of departure were also not specifically spelt out in the code in view of the fact that they could be taken for granted. Thus, for example, there is no explicit reference to freedom of contract. § 119 BGB envisages three different types of mistake which allow a contract to be rescinded; but the intellectual basis for this rule, i.e. that an error in motive is irrelevant in principle, is not mentioned in the code. The BGB sometimes provides hardly more than the conceptual signposts for the development of legal doctrine. The rules contained in it usually attain a considerable level of abstraction, both as far as form and substance are concerned. Contrary to the Prussian Code (‘Common chicken, geese, ducks, doves and turkeys are to be counted among the chattels appurtenant to a landed estate’) the BGB predominantly does not attempt to provide a careful and detailed regulation of individual situations to be encountered in daily life, but instead makes available a set of rules and concepts which are applicable to a large variety of problems – among them many that could not be envisaged by those who drafted the code. It is hardly surprising that the BGB has come to be regarded as outdated wherever this technique has not been followed and where the code, therefore, confronts its readers with the world of day labourers and coach drivers, or with the merger of migrating bee swarms. In addition, of course, there are open-ended provisions like § 138 I BGB (invalidity of contracts contra bonos mores) or § 242 BGB (obligations must be performed in accordance with the precepts of good faith) by means of which the BGB attempts to achieve a balance between doctrinal stability and flexibility.
X. The Development of Private Law under the Code

The foundation was thus laid for courts of law and legal scholarship, in characteristic cooperation, to bring the letters of the law to life, to interpret and develop the provisions contained in the code, and to adapt them to new circumstances. The details of this process are analysed in a new, historical commentary on the German Civil Code. A suitable methodological background was provided by the interest-based approach which was established by Philipp Heck but can ultimately be traced back to Rudolf von Jhering. After 1945, the focus on interests was substituted by an emphasis on the balancing of evaluations. Courts and legal writers attempted to tackle the problems arising from awkwardly formulated, or idiosyncratic, provisions, from a lack of systematic coordination (the relationship between the rules on unjustified enrichment and those on so-called owner-possessor relationships), from individual rules which soon turned out to be unsuitable (the six-month prescription period, running from the moment of delivery for claims based on latent defects in contracts of sale), or from the fact that the scope of application of a provision came to be seen as too narrow (the in pari turpitudine rule, as contained in § 817, 2 BGB) or too wide (mortus redhibetur, as adopted in § 350 BGB). ‘Gaps in the law’ had to be filled, drafting mistakes had to be corrected, and indeterminate legal concepts had to be specified. Legal solutions had to be found, on the basis of the considerations underlying the regulations in the code, for complex patterns of facts (the various categories of three-party situations in the law of unjustified enrichment). New legal questions, not even imaginable at the beginning of the twentieth century, had to be solved (wrongful birth). New types of contracts which came to be established in business life (such as leasing), had to be brought within the system of contracts provided by the BGB. Changes in social mores had to be accommodated, such as the commercialization of ever increasing aspects of life, including holidays and leisure time. The law of damages and of unjustified enrichment, as well as other areas, where the BGB contains hardly more than a number of general concepts and provisions, had to be filled with finely nuanced rules and doctrines.

Spacious doctrinal edifices have been created even where the BGB contains hardly more than individual building blocks (Störung der Geschäftsgrundlage). Some of these doctrines have been developed in spite of the fact that there does not really exist a ‘legal gap’ in the BGB, others have been smuggled into the code along side-paths which had not been designed for that purpose (the right to an established and operative business). New systematic schemes have been devised (enrichment by transfer, enrichment based on an encroachment) and new theoretical frameworks came to be established (liability based on reasonable expectations). The ‘materialization’ of German contract law was evident not only in acts of special legislation outside the BGB – such as the Standard Terms of Business Act, or the rights of revocation contained in a number of consumer protection statutes – but also in the way in which rules like § 138 I BGB came to be applied, for instance, to installment credit transactions, or to contracts of suretyship entered into by an imppecunious wife or child of the main debtor, or in the scope of application given to a doctrine such as culpa in contrahendo. The openness and flexibility of the Generalklauseln turned out to be a curse under the National Socialist regime, and a blessing under the Basic Law of 1949. The doctrine of the indirectly horizontal effect led to German law being adjusted to the system of values embodied in the fundamental rights provisions of the Basic Law; but it also increasingly placed the Federal Constitutional Court in the position of an irregular supreme court of appeal in private law disputes. Occasionally even decisions by the Federal Supreme Court which were clearly contra legem have been sanctioned by the Federal Constitutional Court in view of certain evaluations derived from the Basic Law.

The American comparative lawyer John P. Dawson has famously referred to a German ‘case law revolution’. A large number of ‘legal discoveries’ has been made. Much of what has been discovered is new. But often we also find old wine being poured into new vessels. This is true wherever the rules of the BGB constitute pandectist doctrine in statutory form, where we are dealing with rules of interpretation such as the interpretatio contra eum qui clarius loqui debuisset, or with general maxims underlying the BGB without specifically having been restated in the code (dolo agit qui petit quod statim redditurus est). Wherever a problem has not been decided by the draftsmen of the code but has been left to legal doctrine, the pandectist textbooks also, not rarely, point the way towards the most appropriate solution. We observe the phenomenon of a renaissance of rules and concepts from an ostensibly outdated past (utile per inutile non vitiatur), recourse to the sources of the ius commune continues to be of considerable significance for the proper evaluation and interpretation of the provisions contained in the BGB. Ulrich Huber’s great
monograph on the law of breach of contract can serve as a particularly impressive, as well as comparatively recent, confirmation for the truth of this assertion.

XI. Criticism of the BGB

For more than one hundred years, the BGB has been both a characteristic manifestation and a constituent feature of German legal culture. It has been, and has remained, modern as a result of having provided a framework for an organic development of the law. None the less, there has also always been criticism. This tradition goes back to the period immediately after the publication of the First Draft in 1888. Protagonists of a fundamental line of criticism were then, in particular, the members of the women’s movement, the socialists, and the legal Germanists; they regarded the code as patriarchal, insensitive to social issues, not readily comprehensible, and too pervasively Romanist in spirit, form, and substance. Dieter Schwab has recently demonstrated that such criticism continued after the BGB’s entry into force and that it was, above all, taken up with renewed vigour in times of upheaval. Thus in 1919, as Otto von Gierke had done around the turn of the new century Justus Wilhelm Hedemann pointed out the BGB’s lack of character: ‘It is timid and dull, it displays no vigorous spirit, no characteristic personality’. It was oriented towards the conservative and prosperous citizen. This was also disliked by the BGB’s critics during the time of National Socialism. The code was thought to be characterized by an exaggerated individualism and to reflect a materialistic world order, it was regarded as ‘un-German’, removed from the reality of life, and scholastic. The longing for a law that was ‘German’ now became mixed up with racist ideology. The completion of a ‘People’s Code’, prepared under the auspices of an Academy for German Law by the elite of professors of private law, as far as they were still active in German universities, was prevented by the collapse of the regime. The workers’ and farmers’ paradise of post-war East Germany found the BGB no more appealing than the Nazi state. In 1965 a family law code was enacted and, in 1976, those parts of the BGB that had still been in force until then were replaced by a socialist civil code. In West Germany, the so-called student revolts from 1967 onwards revived the aversion to the BGB: it was of no use for regulating the social processes of our time. The ideological bias of a large part of the fundamentalist opposition to the BGB should not be allowed to obscure the fact that the code has never engendered feelings of affection. Nor has it become a popular part of the German cultural heritage, and it has no share in the creation of a national identity comparable to that of the Code civil in France, or the common law in England. Most German lawyers, in the words of Hein Kotz, pay their code ‘a kind of cool, almost grudging tribute’. Thus, it is hardly surprising that the code’s 100th birthday passed without great celebration by either the general public or the legal community. In 1996 and 2000, a number of articles appeared attempting to provide a detached assessment; an occasional colloquium was held and here and there a series of lectures was organized. No Festschrift was dedicated to the BGB (quite in contrast, incidentally, to the Federal Supreme Court on the occasion of its 50th birthday, celebrated also in 2000). The general tone of the centenary contributions was not exuberant. The technical quality of the code was praised, as ever, as were its intellectual maturity and the fine sense of legislative self-restraint. German lawyers appreciate the BGB as a stable basis for their work. In other countries, it has always been regarded as a typical product of German legal scholarship (‘Never, I should think, has so much first-rate brain power been put into an act of legislation’: F.W. Maitland); not surprisingly therefore, it has had a greater impact on legal theory and legal doctrine in other European countries than on foreign legislation. Still, however, it was received in Greece (with the result that that country is, today, normally regarded as part of the Germanic legal family); it shaped the reform of the Austrian Civil Code in 1914-16; and it influenced the codifications in Italy (1942), Portugal (1966), and the Netherlands (1992). In discussions concerning law reform in the formerly socialist countries and the harmonization of private law in Europe, however, the BGB has often been regarded as outdated. This is, as far as contract law is concerned, largely due to the fact that the Convention on Contracts for the International Sale of Goods has established itself as a more suitable model. Also, a number of the relevant doctrines have been raised by the BGB to a level of abstraction unfamiliar to most lawyers outside Germany: for they are dealt with in the General Part of the BGB, not just the general part of the law of obligations, or of contract law.

Also, of course, it has to be acknowledged that the BGB did in fact contain a number of key provisions that were increasingly regarded as deeply unsatisfactory. They include, as far as the law of obligations is concerned, delictual liability for others in terms of § 831, which is still based on the fault principle in spite of a reversal of the onus of proof, the restrictive attitude with regard to granting compensation for
immaterial damage (§§ 847 and 253 BGB), the excessively differentiated law of extinctive prescription, the outdated system of liability for latent defects in relation to contracts of sale and contracts for work, and the badly coordinated restitution regimes contained in §§ 346 ff. and 812 ff. BGB respectively. In one of these cases, the Federal Supreme Court (with the approval of the Federal Constitutional Court) has gone so far as partially to derogate the relevant rule (§ 253 BGB); in another (§ 831 BGB), the courts have attempted to provide workable solutions by extending the regime provided in § 31 BGB and by opening up a wide grey area between delict and contract which they have subjected to the contractual regime; in the other cases they have explored a multitude of subtle ways to get around the problem but have, at the same time, frequently created new difficulties of delimitation or conflicts in evaluation. In the area of liability for latent defects contractual practice has, of course, also helped to find appropriate solutions. The Ministry of Justice intended to deal with two of the problem areas mentioned above and therefore, in 1967, published a draft statute for the amendment and supplementation of provisions dealing with the law of damages. These proposed reforms have, however, never been implemented.

XII. The Modernization of the Law of Obligations

The idea of a comprehensive reform of the law of obligations seems to be attributable to the then Minister of Justice, Hans-Jochen Vogel. He first presented it to the Federal Parliament in 1978 and subsequently also to the 52nd Deutscher Juristentag (Meeting of the Association of German Lawyers). The main concerns motivating the reform were (i) the integration of a number of special statutes into the BGB (such as, for example, the Standard Terms of Business Act, the Act on Instalment Sales, and several strict liability statutes), (ii) the incorporation of new types of contractual relationships into the BGB (such as doctors’ contracts, contracts concluded with old-age and nursing homes, contracts about the supply of energy, and contracts between private clients and their banks), (iii) the reform of a number of specific types of obligations already dealt with in the BGB (sale, contracts for work, the law of unjustified enrichment, delict), and (iv) the need for reshaping the general law of obligations, particularly for adapting it to new developments on the international level.

The Ministry then requested a number of academic opinions, which were published in three large volumes in 1981 and 1983. Each of the reporters had the task of investigating an area of the law of obligations with a view to its need for reform, and of formulating suggestions as to how such reform might be implemented. Almost all areas within the law of obligations were included, with the important exception of the law of lease. The reports were eagerly discussed, both among academics and the various legal professions; thus, for instance, at the beginning of 1983, the Association of Teachers of Private Law devoted a special Conference to the reform of the law of obligations. A report on the discussion following the introductory keynote speech referred to a mood of ‘sceptical open-mindedness’. One year later, the Federal Minister of Justice established a Reform Commission headed by the responsible Director-General; it consisted of four delegates from the justice departments of the federal states, five judges, one practising lawyer, one notary, and four professors (Uwe Diederichsen, Hein Kotz, Dieter Medicus, and Peter Schlechtriem). The problem areas to be dealt with by the Commission were now limited to the law of breach of contract, liability for defects in contracts of sale and contracts for work, and liberative prescription. The Commission was charged with the task of reshaping the law so as to be clearer and ‘more in keeping with the times’, taking account of the way in which the law had developed in practice. Twenty two meetings were held, each of several days’ duration; in 1992, the Commission presented its final report. In addition to a general section, that report contained specific proposals for legislation in each of the areas mentioned, as well as the reasoning behind these proposals. As far as the general law of breach of contract is concerned, the Commission followed the lead of the UN Convention on the International Sale of Goods (CISG) in many respects. This was entirely in accordance with the views of the initial reporter on this subject, Professor Ulrich Huber of the University of Bonn, who had answered the question: “Is the introduction of a law of breach modelled on the Uniform Sales Law to be recommended?” in the affirmative (though he had still taken his lead from the Convention relating to a Uniform Law on the International Sale of Goods of 17 July 1973).

At the 60th Deutscher Juristentag in September 1994, the Commission’s draft proposals were the subject of the deliberations of the private law section. In spite of occasional fundamental criticism by distinguished academics and outright rejection of the draft by representatives of commerce and industry, the general sentiment towards the draft was favourable. The report summing up the proceedings...
of the *Deutscher Juristentag* in one of the two major general law reviews recorded 'an encouraging result' and appealed to the Government finally to put its words into action; another reporter commented on a discussion that had gone much more smoothly than most participants would have expected. According to Ernst A. Kramer, the discussion displayed 'a fundamentally positive attitude', which also manifested itself in the results of various votes taken at the meeting; by and large they were very heartening for the Commission. Apart from that, however, there was no broadly-based discussion of the draft, either before or after the *Juristentag* in Münster. This was due to an increasingly widespread impression that the draft had disappeared into a drawer in the Ministry of Justice and that its implementation was no longer likely to happen. The excitement associated with an impending reform made way for a general sentiment of indifference. This ended in September 2000 when suddenly something like a bombshell was dropped on the German legal community: the publication of a 630-page 'Discussion Draft' of a statute modernizing the law of obligations. The direct trigger for the Discussion Draft was the enactment of the Consumer Sales Directive and the need for its implementation by 1 January 2002. There can be no doubt that this Directive could have been implemented by effecting a number of comparatively marginal adjustments to German sales law. The Government had, however, decided to use this opportunity finally to carry out the long-postponed reform of the law of obligations. As a result, the entire project was now placed under an enormous pressure of time. This was highly problematic in view of the fact that the Discussion Draft (i) extended the reform agenda that had previously come to be accepted (in particular, it was now proposed to incorporate a number of special statutes concerning consumer protection into the BGB), (ii) even in so far as it dealt with subjects covered by the Draft of the Reform Commission, sometimes significantly deviated from that Draft (particularly concerning the law of prescription), and (iii) had not been brought up to date even where it followed the recommendations of that Commission; thus, it failed to take account of recent international initiatives in contract law (the publication of the Principles of European Contract Law and of the UNIDROIT Principles of International Commercial Contracts) and of new studies fundamentally affecting our perception of German contract law. Academic criticism was not, therefore, long in coming. It was articulated particularly strongly at a Symposium of German professors in private law held at the University of Regensburg in November 2000. It induced the Government to establish two working groups charged with the task of critically examining the Discussion Draft and the recommendations contained in it. The working group concerning breach of contract consisted mainly of professors; the one looking into the law of prescription, sales law, and other matters was constituted by officials from the Ministries of Justice of the various German Länder, judges of the Federal Supreme Court, members of the earlier Reform Commission, practitioners, and one professorial representative. These working groups only had a period of about two months for their deliberations. None the less, they managed to effect a number of substantial changes. In early May 2001 a Government Draft was published which very largely accepted the recommendations of the working groups but also took account of suggestions and requests which had emerged in the course of hearings of interest groups affected by the reform. In the course of summer and autumn 2001 the Government Draft was pushed through Parliament by way of an accelerated procedure. In the process, it was again repeatedly changed. The Modernization of the German Law of Obligations Act was finally approved by the Federal Parliament in October and by the Council of State Governments in early November 2001, and it was promulgated on 26 November 2001. A little more than five weeks later it entered into force.

The reform legislation has divided the German private law professoriate in an unprecedented manner. Strong language has been used to scold the intellectual immaturity of the new law, and the finger of scorn has been pointed at many of its aspects. Others have emphasized the Government’s readiness to listen to academic criticism, to involve leading legal academics in the process of revising the Discussion Draft, and to follow many of their suggestions. In the meantime, German lawyers have had to come to terms with the reform, however critically it may have to be evaluated. An enormous amount of legal literature has appeared, whether in the form of textbooks, commentaries, or even articles. It continues to grow with frightening rapidity. Much more than has hitherto been the case German authors will, however, have to cease to look at German law in isolation. They will have to take account of, and at the same time contribute to, what must be considered to be one of the most important legal developments of our time: the increasing Europeanization of private law.

**XIII. The Europeanization of Private Law**
From about the mid-1980s, the European Communities began to enact Directives which profoundly affect core areas of the national systems of private law. As milestones of this development were the Directives concerning liability for defective products, contracts negotiated away from Business premises, consumer credit, package travel, unfair terms in consumer contracts, and consumer sales. As a result, the requirement of interpreting provisions of national law in conformity with the Directives on which they are based has attained considerable practical importance. In addition, the European Court of Justice, though not a Supreme Court for private law disputes in the European Union, has started to fashion concepts, rules, and principles which are relevant not only for the law of the Union but also for the private laws of its Member States. Several international commissions and groups of experts are busy developing or ‘finding’ (by means of a type of restatement) common principles of a European law of contract, torts, or even trusts or family law. Ambitious research projects strive to establish the ‘common core’ of European private law. The codification of European private law has been championed, consistently, by the European Parliament, first in a resolution of May 1989. The Commission of the European Union has, more cautiously, issued an action plan for a more coherent European contract law which, inter alia, aims at the development of a ‘common frame of reference’. This frame of reference is supposed to provide the basis for further deliberations on an optional instrument in the field of European contract law. The Principles of European Contract Law, drawn up by the so-called ‘Lando Commission’ constitute a blueprint for such instrument. Among academics across Europe the desirability of a European Civil Code has become a hotly contested issue. Two international initiatives have already embarked on an attempt to devise draft codes for the field of contract law and beyond. In legal education, too, there are signs of a change of perspective. The mobility of law students within the European Union is promoted by the extraordinarily successful Erasmus (now Socrates) Programme. More and more law faculties are trying to give themselves a ‘European’ profile by offering integrated study programmes. Institutes and chairs of European private law, European business law, or European legal history have been established. Models of legal harmonization from Europe’s past and from other parts of the world are receiving increasing attention. Moreover, the national isolation of law and legal scholarship is being overcome by the uniform private law laid down in international conventions. Of central importance, in this respect, is the success story of the Convention on the International Sale of Goods, which is beginning to play an increasingly important role in private law adjudications by national Supreme Courts. The development sketched, so far, in the roughest outline is also reflected in the emergence of a legal literature focusing on European, rather than merely national, law. This began in the fields of comparative law and legal history. Since then, we have seen the publication of a textbook on the European law of contract, delict, and unjustified enrichment of comparative casebooks, of series of monographs dealing with European legal history and European private law, of at least three legal Journals which are devoted to European private law, and of collections of the foundational texts in the field.

At the same time it is clear that we will still be faced, in the foreseeable future, with the coexistence of a great number of national systems of private law in Europe. Much would, however, be gained, if these could be assimilated gradually, or organically. This requires the protagonists of national legal development to be aware of what happens in the other national legal systems and on the European level, critically to examine quirks and idiosyncracies of their own legal systems, and to adopt, whenever possible, a harmonizing approach. Those responsible for determining the direction of European private law, on the other hand, have to take account of the national legal experiences which have been gathered by sophisticated courts and legal writers.

It is in this spirit that the studies collected in the present volume attempt to assess the recent reform of German contract law.

Endnotes

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6 The Afschaffingswet was dated 16 May 1829; for all details, see Hendrik Kooiker, Lex Scipta Abrogata: De derde renaissance van het romeinse recht, vol. I (1996).


13 Koschaker (n. 4) 292.

14 Emil Friedberg, Die künftige Gestaltung des deutschen Rechtsstudiums nach den Beschlüssen der Eisenacher Konferenz (1896), 7 ff.

15 Zimmermann (n. 12) 3 ff.


Bernhard Windscheid, ‘Das römische Recht in Deutschland’ (1858), in *idem, Gesammelte Reden und Abhandlungen*, ed. Paul Oertmann (1904), 48 ff.


Koschaker (n. 4) 269. On the ‘discovery of legal history’ in the nineteenth century, see Wieacker (n. 4) 330 ff.


Bernhard Windscheid, ‘Recht und Rechtswissenschaft’ (1854), in *idem* (n. 18) 16.


Wieacker (n. 4) 309 ff.

Wieacker (n. 4) 290 ff.

Savigny (n. 22) xiv ff.

Bernhard Windscheid, ‘Die geschichtliche Schule in der Rechtswissenschaft’ (1878), in *idem* (n. 18) 66.


Savigny (n. 24) *passim*, for example, 79 ff.


35 See, for example, his address in memory of Savigny: ‘Festrede zum Gedenken an Savigny’ (1879), in *idem* (n. 18) 81 ff. On Windscheid’s attitude towards Savigny, see Oertmann (in his preface to the volume just mentioned, XXVII ff.); Jakobs (n. 34) 101 ff.; Falk (n. 17) 174 ff.

36 Windscheid (n. 30) 70.


44 Bibliographie der amtlichen Materialien zum Bürgerlichen Gesetzbuche für das Deutsche Reich und zu seinem Einführungsgesetze (1897).

45 Mugdan (n. 11).


Windscheid (n. 18) 48.


In this regard, see Thomas Honsell, *Historische Argumente im Zivilrecht* (1982), 22 ff., with references.


See, for example, Ernst Zitelmann, *Die Gefahren des Bürgerlichen Gesetzbuches für die Rechtswissenschaft* (1896), 14.

See, for example, Rudolph Sohm, ‘Das Studium des römischen Rechts’, [1908] *Deutsche Juristenzeitung* 39 and the references in Honsell (n. 51) 24.

See Wieacker (n. 4) 463 ff.; Honsell (n. 51) 25.

On which see, for example, Wieacker (n. 4) 457 ff.


This quotation is from an article published in 1913/14; the relevant passage is cited in Ernst Rabel, ‘Aufgabe und Notwendigkeit der Rechtsvergleichung’, in *idem*, *Gesammelte Aufsätze*, vol. III (1967), 13 ff.

See Paul Laband, [1906] *Deutsche Juristenzeitung*, col. 2 ff. (who states that the literature in the area of private law broke forth ‘with the suddenness and violence of a cloudburst’).


See Mohnhaupt (n. 63) 495.
For early criticism, see Ludwig Kuhlenbeck, *Von den Pandekten zum Bürgerlichen Gesetzbuch: Eine dogmatische Einführung in das Studium des Bürgerlichen Rechts*, Part I (1898), vii; and cf. Mohnhaupt (n. 63) 495 ff.

See the characteristic comment in (1900) 29 *Juristische Wochenschrift* 4.


Koschaker (n. 4) 190.

See Kuhlenbeck (n. 65) vii. Generally on the ‘historical argument’ in contemporary legal thinking and practice, see Honsell (n. 51) 47 ff.

Friedberg (n. 14).


On which see, most recently, Ulrich Huber, *Leistungsstörungen*, vol. I (1999), 97 ff.

Infra p. 92.

Dirk A. Verse, *Verwendungen im Eigentümer-Besitzer-Verhältnis* (1999), has recently demonstrated, with regard to compensation for improvements, the specific value of an historical and comparative approach.

This view was expressed, for example, by one of the most influential early commentators on the BGB, A. Achilles (judge of the Reichsgericht): cf. Mohnhaupt (n. 63) 502.

Bernhard Windscheid and Theodor Kipp, *Lehrbuch des Pandektenrechts*, vol. I, 9th edn., § 28, note 4; and see the revisionist works by Falk and Ogorek (nn. 17 and 53).


See, for instance, the references in Windscheid and Kipp (n. 76) § 451, note 1 (concerning loss resulting from unlawful arrest).

This enabled Zachariae von Lingental to discuss the French law of delict in a way which hardly differed from German law: *Handbuch des Französischen Civilrechts*, vol. II, 6th edn. (1875), § 444.

See, for example, Heinrich Dernburg, *Pandekten*, vol. I, 5th edn. (1896), § 199, 4.

19

84 Detlef Kleindiek, *Deliktshaftung und juristische Person* (1997), 63 ff.


87 Josef Partsch, *Vom Beruf des römischen Rechts in der heutigen Universität* (1920), 39.

88 Hans-Peter Haferkamp, ‘Die exceptio doli generalis in der Rechtsprechung des Reichsgerichts vor 1914’, in Falk and Mohnhaupt (n. 63) 1 ff.

89 Tomasz Giaro, ‘Culpa in contrahendo: eine Geschichte der Wiederentdeckungen’, in Falk and Mohnhaupt (n. 63) 113 ff.


92 And thereby continued a development which has its origins in legal scholarship and legislation of the nineteenth century; see Zimmermann (n. 12) 94 ff., with references; Glöckner (n. 91) 167 ff.


94 Reinhard Zimmermann and Dirk A. Verse, ‘Die Reaktion des Reichsgerichts auf die Kodifikation des deutschen Deliktsrechts (1900–14)’, in Falk and Mohnhaupt (n. 63) 319 ff.


99 See Zimmermann (n. 12) 47 ff.

100 Windscheid (n. 30) 75 ff.

101 Cf., for example, RGZ 78, 239 at 240 ff. (the ‘linoleum’ case, 7 December 1911).

102 Cf., for example, RGZ 91, 21 at 24 (contaminated residence, 5 October 1917).
See, for example, the references in Luig (n. 91) 181 ff. Generally, see Reinhard Zimmermann, "Heard melodies are sweet, but those unheard are sweeter ...": Condicio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts', (1993) 193 Archiv für die civilistische Praxis 165 ff.

See, for example, the references in Giaro (n. 89) 130 ff.

In this regard, see Thomas Finkenauer, 'Das entstehungsgeschichtliche Argument als Etikettenschwindel: Zwei Beispiele aus der Rechtsprechung des Reichsgerichts zum Bereicherungsrecht', in Falk and Mohnhaupt (n. 63) 305 ff.


Zweigert and Kötz (n. 8) 144.


Udo Wolter, Mietrechtlicher Bestandsschutz (1984); Heinrich Honsell, Privatautonomie und Wohnungsmiete, (1986) 186 Archiv für die civilistische Praxis 115 ff. In September 2001, however, the law of domestic leases was re-incorporated into the BGB.


Further examples are provided by § 90a (and, in this connection, a number of other new provisions on the legal status of animals) (on which, see Helmut Heinrichs, in Palandt, Bürgerliches Gesetzbuch, 64th edn. (2005), § 90a, n. 1: a 'sentimental pronouncement without any effective legal content') and § 55a (see Palandt/Heinrichs (as above) § 55a, n. 1: 'contrary to the system of the law').


See infra pp. 165 ff., 169.

For all details, see infra pp. 159 ff., 205 ff.
For details, see Gerhard Wagner, *Das neue Schadensersatzrecht* (2002).


Windscheid (n. 30) 75.

Jakobs (n. 34) 160. He goes on to state that the BGB ‘should not, and will not, control legal scholarship, but should be, and will be, controlled by the latter, if such legal scholarship is itself historical, in the full sense of the word’.


§ 58 I 2 PrALR.

§ 196, nos. 3 and 9 BGB (old version).

§ 963 BGB.

These *Generalklauseln* are a characteristic element of German private law; they constitute the most important as well as the most convenient ports of entry for the values of the community. For a famous warning against the dangers inherent in these provisions, see Justus Wilhelm Hedemann, *Die Flucht in die Generalklauseln: Eine Gefahr für Recht und Staat* (1933).


134 So far, the first volume (covering the General Part of the BGB, i.e. §§ 1–240) has appeared: Mathias Schmoeckel, Joachim Rückert and Reinhard Zimmermann (eds.), Historisch-kritischer Kommentar zum BGB, vol. I (2003); the second volume (covering the general part of the law of obligations, i.e. §§ 241–432) is in preparation for 2006.


139 It was developed by Günter Dürig, ‘Grundrechte und Zivilrechtsprechung’, in Festschrift für Hans Nawiasky (1956), 158 ff. and has been adopted by the Federal Constitutional Court in its Lüth decision: BVerfGE 7, 198; on which see David P. Currie, The Constitution of the Federal Republic of Germany (1994), 181 ff.

140 This has been severely criticized: Uwe Diederichsen, ‘Das Bundesverfassungsgericht als oberstes Zivilgericht – ein Lehrstück der juristischen Methodenlehre’, (1998) 198 Archiv für die civilistische Praxis 171 ff.


146 For details, see Dieter Schwab, (2000) 22 Zeitschrift für Neuere Rechtsgeschichte 325 ff., with references.

147 Schwab (n. 146) 334 ff.

148 In an academic speech in 1919, cited by Schwab (n. 146) 337.

Rudolf Wiethölter in his radio lectures, broadcast by the radio station of Hesse; for details, see Schwab (n. 146) 344 ff.


For example, the symposium ‘Das Bürgerliche Gesetzbuch und seine Richter’, the contributions to which have been published in the volume edited by Falk and Mohnhaupt (n. 63). The centenaries of the BGB and the Staudinger commentary were celebrated at a symposium in Munich in June 1998; on which see the volume edited by Martinek and Sellier (n. 43). The papers presented at the Salzburg conference of the Association of Teachers of Private Law in September 1999 also dealt with the application and further development of the BGB over the last one hundred years; see (2000) 200 *Archiv für die civilistische Praxis* 273 ff. The Association of Young Academics in Private Law had already held a conference on the BGB in 1996; its proceedings are documented in the *Jahrbuch Junger Zivilrechtswissenschaftler* (1996).


For an overview, see Wieacker (n. 4) 383 ff.; Zweigert and Kötz (n. 8) 154 ff. And see the contributions in (2000) 200 *Archiv für die civilistische Praxis* 365 ff., 493 ff.

*Supra* n. 141.

Cf., for example, BGHZ 26, 349 ff. (gentleman horse-rider); BGHZ 35, 363 ff. (ginseng roots).

See Kleindiek (n. 84) 314 ff., 340 ff.

See, from a comparative perspective, Zweigert and Kötz (n. 8) 630 ff.; Markesinis and Unberath (n. 141) 701 ff.


In particular: recent developments of the law of contract in Europe (Max Planck Institute, Hamburg), extinctive prescription (Frank Peters and Reinhard Zimmermann), law of damages (Gerhard Hohloch), pre-contractual liability (Dieter Medicus), long-term contracts (Norbert Horn), breach of contract (Ulrich Huber), contracts of sale (Ulrich Huber), contracts concerning residence and care in homes for senior citizens (Gerhard Igl), contracts for medical treatment (Erwin Deutsch, Michael Geiger), contracts for work (Hans-Leo Weyers), contracts to take care of a matter for somebody against valuable consideration (Hans-Joachim Musielak), giro account relationships (Franz Häuser), law of negotiable instruments (Ingo Koller), unjustified enrichment (Detlef König), contractual and extra-contractual liability (Peter Schlechtriem), law of delict (Christian von Bar), strict liability (Hein Kötz), consumer protection (Harm Peter Westermann), contracts for the provision of energy (Volker Emmerich), contracts of employment (Manfred Lieb), building contracts (Kurt Keilholz), negotiorum gestio (Johann Georg Helm), partnership (Karsten Schmidt), suretyship and guarantee (Walther Hadding, Frank Häuser, and Reinhard Welter). In addition, in 1986 and on behalf of the Hamburg Max Planck Institute, Jürgen Basedow submitted a comparative report on the development of the law of sale: Jürgen Basedow, Die Reform des deutschen Kaufrechts(1988).

This was also pointed out by Dieter Medicus, ‘Zum Stand der Überarbeitung des Schuldrechts’, (1988) 188 Archiv für die civilistische Praxis 169 (‘striking’).

See, for example, the contributions in (1982) 37 Neue Juristische Wochenschrift 2017 ff. (by Jürgen Schmude, Helmut Heinrichs, Wolfgang B. Schünemann, Manfred Lieb, Ulrich Hübner and Johannes Denck), and the bibliography included in Wolfgang Ernst and Reinhard Zimmermann (eds.), Zivilrechtswissenschaft und Schuldrechtsreform (2001), as appendix II A.

The papers (by Manfred Lieb, Eduard Picker, Max Vollkommer, Hans G. Leser and Klaus J. Hopt) were published in (1983) 183 Archiv für die civilistische Praxis 327 ff.


The reporters were Hein Kötz, Peter Joussen and Gerd Brüggemeier.


These votes are documented in *Verhandlungen* II/1 (n. 152) K 103 ff.

This has repeatedly been criticized. See, for example, Harm Peter Westermann, [1994] *Monatsschrift für Deutsches Recht* 1. But see the discussion on the occasion of the 24th congress of German notaries, based on papers presented by Günther Brambring and Hermann Amann, as well as the literature listed in Ernst and Zimmermann (n. 169) appendix II B.

The text of the draft rules is easily accessible in Ernst and Zimmermann (n. 169) appendix I; the draft rules plus motivation can be found in Claus-Wilhelm Canaris (ed.), *Schuldrechtsmodernisierung 2002* (2002), 3 ff.


Another symposium was held in January 2001: Reiner Schulze and Hans Schulte-Nölke (eds.), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (2001). On 30/31 March 2001 the Association of German Teachers of Private Law held a special meeting in Berlin to discuss what had by then become the revised version of the Discussion Draft. The lectures delivered at that meeting have been published in a special issue of *Juristenzeitung*: [2001] *Juristenzeitung* 473 ff. The revised version of the Discussion Draft (known as *Konsolidierte Fassung des Diskussionsentwurfs eines Schuldrechtsmodernisierungsgesetzes*) can be found in Canaris (n. 185) 349 ff.


For details, see Canaris (n. 185) x.

Thus, for example, the Council of State Governments submitted proposals for 150 amendments, of which the Government accepted about 100; see ‘Stellungnahme des Bundesrates (31 August 2001)’ and ‘Gegenäußerung der Bundesregierung zur Stellungnahme des Bundesrats zum Entwurf eines Gesetzes zur Modernisierung des Schuldrechts’, both now easily accessible in Canaris (n. 185) 935 ff., 995 ff.


These, and the other Directives in the field of private law, can conveniently be found in Oliver Radley-Gardner, Hugh Beale, Reinhard Zimmermann and Reiner Schulze (eds.), Fundamental Texts on European Private Law (2003), sub I.


Michael Faure, Jan Smits and Hildegard Schneider (eds.), *Towards a European Ius Commune in Legal Education and Research* (2002).


*Zeitschrift für Europäisches Privatrecht, European Review of Private Law, Europa e diritto privato.*

Radley-Gardner, Beale, Zimmermann and Schulze (n. 197).

See, as far as the judiciary is concerned, Walter Odersky, ‘Harmonisierende Auslegung und europäische Rechtskultur’, (1994) 2 *Zeitschrift für Europäisches Privatrecht* 1 ff.; and see Zimmermann (n. 205) sub V.

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